

Appellant-defendant Kevin Dean Stanifer appeals the sentence that was imposed following his guilty plea to Battery Resulting in Serious Bodily Injury,¹ a class C felony, and to being a Habitual Offender.² Specifically, Stanifer argues that the trial court abused its discretion by considering aggravating circumstances that were not supported by the record and by circumventing the plea agreement. In addition, Stanifer maintains that his sixteen-year sentence is inappropriate in light of the nature of the offense and his character. Finding that the trial court abused its discretion by circumventing the plea agreement, we affirm in part, reverse in part, and remand with instructions to eliminate the provision in the sentencing order requiring Stanifer to serve the remainder of his executed sentence with the Department of Correction if he does not qualify for or is rejected by community corrections.

FACTS

On March 26, 2007, while serving a sentence on home detention, Stanifer cut off his monitoring bracelet and went to the home of Tom and Shonda McIntyre, where he met Kevin Reynolds. Both Reynolds and Stanifer were drinking alcohol, and Stanifer became intoxicated. The two had a disagreement and Stanifer kneed Reynolds in the face. Reynolds fell and Stanifer punched him repeatedly until Shonda McIntyre restrained him. Reynolds was taken to a hospital emergency room, where it was

¹ Ind. Code § 35-42-2-1(a)(3).

² Ind. Code § 35-50-2-8.

determined that Reynolds suffered blunt head trauma, a mild concussion, broken facial bones, and a possible brain contusion.

On May 4, 2007, Stanifer was charged with Count I, battery resulting in serious bodily injury, a class C felony; Count II, criminal recklessness resulting in serious bodily injury, a class D felony; Count III, escape, a class D felony; and Count IV, being a habitual offender. On September 19, 2007, an additional count of escape was filed.

On December 4, 2007, Stanifer pleaded guilty to Counts I and IV in exchange for the State's agreement to dismiss the remaining charges. His plea agreement provided that he would be sentenced as the court deemed appropriate, but that the executed portion of his sentence could not exceed twelve years and that at least two years of the executed portion would be served on community-based corrections. In addition, the plea agreement required that Stanifer pay restitution.

The trial court accepted the plea agreement, and at the sentencing hearing that commenced on February 6, 2008, the trial court found Stanifer's criminal history, probation violation, and escape from home detention to be strong aggravating factors. In addition, the trial court found Stanifer's guilty plea, his remorse, his willingness to make restitution, and the presence of his family's support to be mitigating factors.

The trial court concluded that the aggravating factors outweighed the mitigating factors and sentenced Stanifer to seven years imprisonment for battery resulting in serious bodily injury. This sentence was enhanced by nine years because of his habitual offender status, for a total term of sixteen years. Stanifer was ordered to serve twelve

years in the Indiana Department of Correction (DOC), including two years with the Tippecanoe County Community Corrections. The trial court further ordered that if Stanifer failed to qualify for or was rejected by community corrections, he was to be transported to the DOC to serve the remainder of his executed sentence. Four years of Stanifer's sentence were suspended to supervised probation and he was ordered to pay \$13,726.00 in restitution. Stanifer now appeals.

DISCUSSION AND DECISION

I. Aggravating Factors

Stanifer first contends that the trial court abused its discretion by considering aggravating factors that were not supported by the record. Specifically, Stanifer contends that the trial court abused its discretion by considering a juvenile battery charge that resulted in a pretrial diversion and a charge for battery resulting in serious bodily injury that was later dismissed when Stanifer pleaded guilty to other charges.

We initially observe that sentencing decisions rest within the trial court's sound discretion and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. 868 N.E.2d at 490. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating factors and explain why each

circumstance has been determined to be mitigating or aggravating. Id. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

Stanifer argues that because neither his juvenile battery charge nor his dismissed battery charge resulted in a conviction, they are not supported by the record. Here, the record indicates that on February 5, 2001, Stanifer received a diversion for battery as a class B misdemeanor, with the requirement that he complete ten hours of community service. 1 Vol. Green App. p. 3. In addition, the record states that on February 6, 2003, Stanifer was charged with battery resulting in serious bodily harm as a class D felony, but the charge was subsequently dismissed. Id. at 4. Thus, both the juvenile battery diversion and the charge of battery resulting in serious bodily injury are supported by the record.

Nevertheless, Stanifer maintains that under Indiana's former sentencing scheme, "it was impermissible to consider prior arrests as a history of criminal conduct." Appellant's Br. p. 12. While it is true that under the "presumptive" sentencing scheme, a sentencing court could not enhance a sentence because of prior criminal activity on the basis of charges alone, see Turnstill v. State, 568 N.E.2d 539, 545 (Ind. 1991), the General Assembly revised Indiana's sentencing scheme in 2005 and replaced the "presumptive" sentencing scheme with an "advisory" sentencing scheme, Anglemyer, 868 N.E.2d at 487-88. This change eliminated the requirement that trial courts consider

certain mandatory circumstances when determining the exact sentence to impose, and the amended statute now includes a non-exhaustive list of aggravating and mitigating circumstances that the trial court “may consider.” Id. at 488. Also, because Stanifer committed the offense in 2007, the advisory sentencing scheme applies. See Guteruth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (holding that the version of the statute in effect at the time of the offense applies). Thus, the trial court may consider factors not specifically enumerated in the statute as long as they are supported by the record and are not improper as a matter of law. Anglemyer, 868 N.E.2d at 490-91.

As stated above, the prior charges are supported by the record. Furthermore, even under the “presumptive” scheme, prior charges were relevant as evidence that “subsequent antisocial behavior on the part of the defendant has not been deterred even after having been subject to the police authority of the State.” Turnstill, 568 N.E.2d at 545. Therefore, considering prior charges as aggravating factors is not improper as a matter of law.

Moreover, although the trial court was partially referring to Stanifer’s juvenile battery diversion when it stated that “you have at least two battery convictions,” appellant’s app. p. 77, there is support for this statement. Specifically, the record shows that Stanifer was convicted of two counts of battery by bodily waste on April 7, 2004. 1 Vol. Green App. p. 4. Therefore, the trial court did not abuse its discretion by concluding that Stanifer had two previous convictions for battery.

II. Violation of the Plea Agreement

Stanifer maintains that the trial court abused its discretion by circumventing the plea agreement in two ways. First, Stanifer contends that it was inappropriate for the trial court to consider his escape from home detention as an aggravating factor because the State agreed to dismiss the two counts of escape pursuant to the plea agreement. In addition, Stanifer argues that the trial court violated the terms of the plea agreement by ordering that if Stanifer does not qualify for or is rejected by community corrections, he is to serve the remainder of his executed sentence with the DOC.

The trial court found Stanifer's escape from house arrest to be an aggravating factor. Appellant's App. p. 77. Stanifer cites Roney v. State, 872 N.E.2d 192, 201 (Ind. Ct. App. 2007), for the proposition that "[i]f a trial court accepts a plea agreement under which the State agrees to drop or not file charges, and then uses facts that give rise to those charges to enhance a sentence, it in effect circumvents the plea agreement."

In Roney, the defendant challenged the trial court's consideration of uncharged crimes as aggravating circumstances. Id. at 200. The defendant argued that because the State agreed not to file additional charges, it was improper for the trial court to use them as aggravating factors to enhance the defendant's sentence. Id.

This court held that it was improper for the trial court to consider any uncharged crimes when the State agreed not to file additional charges. Id. at 201. Nevertheless, we determined that the trial court's consideration of the multiple injuries that the victim suffered was not improper because the trial court was not making reference to any

uncharged offenses, but rather, commenting on the nature and circumstances of the crime, which are proper aggravating factors. Id. at 200.

Initially, we note that Roney was decided under the “presumptive” sentencing scheme. Id. at 198. Under this scheme, the trial court had to find particular aggravating factors that outweighed any mitigating factors before it could sentence a defendant beyond the presumptive sentence. Id. However, under the new “advisory” scheme, the Generally Assembly retained the lower and upper limits for each felony class, but eliminated fixed presumptive terms in favor of “advisory sentences” that are between the minimum and maximum terms. Anglemyer, 868 N.E.2d at 487-88. Therefore, a trial court now has the discretion to sentence a defendant to any term between the minimum and maximum regardless of the presence or absence of aggravating or mitigating factors. Id. at 489.

Here, because Stanifer was sentenced within the statutory range for both offenses to which he entered a guilty plea,³ there was no enhancement beyond the statutory maximum. See Anglemyer, 868 N.E.2d at 490 (“What [Blakely] does prohibit is a trial court finding an aggravating circumstance and enhancing a sentence beyond the statutory maximum.”) (emphasis in original).

Moreover, similar to Roney, the trial court’s reference to Stanifer’s escape from house arrest was a comment on the nature and circumstances of the crime. Specifically,

³ Indiana Code section 35-50-2-6 provides that a defendant convicted of a class C felony will be sentenced between two and eight years imprisonment with the advisory sentence being four years. Under Indiana Code section 35-50-2-8, a defendant who has been convicted of a class C felony will be sentenced an additional four to twelve years if the defendant is found to be a habitual offender.

at the sentencing hearing, the trial court stated: “You also were on house arrest and violated the conditions of house arrest to put yourself in the circumstances which resulted in this crime. There’s a violation of probation. And then you compounded that by escaping from house arrest after this to avoid the consequences.” Appellant’s App. p. 77. The trial court does not mention that the State had charged Stanifer with escape, but instead, appears to be commenting on the circumstances surrounding the crime. See Roney, 872 N.E.2d at 200 (“The trial court never mentioned any possible crime with which Roney could have been charged . . . instead [the trial court] appears to be commenting on the brutal nature of the crime.”). Thus, this claim fails.

Stanifer also contends that the trial court violated his plea agreement by ordering him to return to the DOC to serve the remainder of his executed sentence if he fails to qualify or is rejected by community corrections. Stanifer’s plea agreement provides in relevant part that “the parties agree that any executed portion of the sentence shall not exceed twelve (12) years; and that at least two (2) years of any executed portion shall be on community based corrections. . . . This agreement embodies the entire agreement between the parties. . . .” Appellant’s App. p. 21-22. Thus, Stanifer maintains that “[t]he plea agreement did not give the court discretion to decide that the last two years could be served in the [DOC] under any circumstances.” Appellant’s Br. p. 15.

A plea agreement is contractual in nature and is binding upon the State, the defendant, and the trial court. Briscoe v. State, 783 N.E.2d 790, 791 (Ind. Ct. App. 2003). A trial court may reject the plea agreement, but if the trial court accepts it, the

terms constrain the trial court's discretion during sentencing. Id.; see also Ind. Code. § 35-35-3-3(e) ("If the court accepts a plea agreement, it shall be bound by its terms."). Moreover, our Supreme Court has held that "[i]t is to the interest of both the defendant and the public to facilitate expeditious disposition of criminal cases. Strict adherence to the agreement is essential to this purpose.'" Freije v. State, 709 N.E.2d 323, 325 (Ind. 1999) (quoting State ex rel Goldsmith v. Marion County Super. Ct., 419 N.E.2d 109, 114 (Ind. 1981)).

In Briscoe, the trial court imposed a fine on the defendant that was not authorized by the defendant's plea agreement. 783 N.E.2d at 791. The defendant appealed the imposition of the fine, and this court held that because the plea agreement did not provide for a fine, the trial court erred by varying the terms of the plea agreement. Id. at 792.

Likewise, Stanifer's plea agreement with the State contains no provision stating what would occur if Stanifer does not qualify for or is rejected by community corrections. In fact, the plea agreement explicitly states that "at least two (2) years of any executed portion shall be on community based corrections." Appellant's App. p. 21 (emphasis added). Under the facts as they now exist, we can only conclude that the trial court erred in ordering Stanifer to serve the remainder of his executed sentence with the DOC if he is rejected by or fails to qualify for community corrections, and we reverse that portion of Stanifer's sentence.

Notwithstanding our conclusion above, we emphasize that if Stanifer violates the terms of his placement into community corrections, "the court may, after a hearing . . .

[r]evoke the placement and commit [Stanifer] to the department of correction for the remainder of [his] sentence.” Ind. Code § 35-38-2.6-5; see also Toomey v. State, 887 N.E.2d 122, 124-25 (Ind. Ct. App. 2008) (holding that the trial court may revoke a defendant’s placement into community corrections for a violation that occurs before or during placement). Thus, there are circumstances under which the trial court could order Stanifer to serve his entire twelve-year executed sentence with the DOC; however, there is no evidence in the record that these circumstances presently exist.

III. Inappropriate Sentence

Stanifer argues that his sentence is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). The advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006).

Stanifer pleaded guilty to class C felony battery resulting in serious bodily harm and to being a habitual offender. Stanifer points out that his sixteen-year sentence is close to the maximum sentence for these offenses, and the twelve-year executed term is the maximum executed sentence that Stanifer could have received under the plea agreement. Thus, Stanifer maintains that this sentence is inappropriately severe, and argues that his sentence should be reduced to eight years imprisonment, with two years to be served in community corrections.

As for the nature of the offense, Stanifer struck Reynolds in the face with his knee and then repeatedly hit Reynolds until Shonda McIntyre intervened. As a result, Reynolds suffered blunt head trauma, a mild concussion, broken facial bones, and a possible brain contusion. At the time of sentencing, Reynolds still suffered from sharp pain on the left side of his face, and he stated in a letter to the trial court that Stanifer's acts have forever changed him mentally, emotionally, and physically. 1 Vol. Green App. p. 76-77. Moreover, Stanifer was on house arrest at the time he attacked Reynolds. Therefore, the nature of the offense does not assist Stanifer with his argument that his sentence is inappropriate.

In examining Stanifer's character, we find his argument that his "character does not demand that he serve a sixteen year (twelve year executed) sentence" because "[a]lcohol has been an ongoing problem for him and has contributed to most, if not all, of his offenses," to be unavailing. Appellant's Br. p. 20. The record demonstrates that Stanifer has had problems with alcohol since at least 2000, including arrests and convictions for minor consumption, operating a vehicle while intoxicated, public intoxication, battery by bodily waste, and operating a vehicle with a prior conviction. 1 Vol. Green App. p. 3-5. He has had three petitions to revoke probation with one pending at the time he was sentenced for the present offense. Id. at 5. In 2004 and 2006, he was ordered to complete the court services alcohol education program, but nevertheless, it was in March 2007 when Stanifer struck Reynolds multiple times while intoxicated.

Thus, it is clear that intervention by the criminal justice system has not deterred Stanifer from consuming alcohol and engaging in criminal conduct.

Moreover, although we applaud Stanifer's efforts to take responsibility for his actions by admitting that he has an alcohol problem, acknowledging the harm he caused Reynolds, and agreeing to pay restitution, we cannot say that in light of his lengthy history of alcohol-related offenses that his character renders his sentence inappropriate. Thus, Stanifer's inappropriateness claim fails.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions that the trial court eliminate the provision in the sentencing order requiring Stanifer to serve the remainder of his executed sentence with the DOC if he fails to qualify for or is rejected by community corrections.

MATHIAS, J., and BROWN, J., concur.